

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

No. 15-1063 (and consolidated cases)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review from the Federal Communications Commission

**NOTICE OF CONSENT FROM ALL PARTIES FOR
ELECTRONIC FRONTIER FOUNDATION AND
THE AMERICAN CIVIL LIBERTIES UNION
TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENTS**

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September 4, 2015

Counsel for Amici Curiae

Pursuant to Fed. R. App. P. 29(a), D.C. Circuit Rule 29(b), and the briefing schedule established in these consolidated cases on June 29, 2015, Electronic Frontier Foundation and the American Civil Liberties Union notify the Court of their intent to file an *amici curiae* brief in the above-captioned proceeding in support of Respondents. Counsel for all Petitioners, Respondents, and Intervenors have consented to, or indicated they do not oppose, the filing of this *amici* brief. In support of this notification, *amici* state the following:

EFF is a member-supported nonprofit organization devoted to protecting civil liberties and free expression in technology, law, policy and standards. With close to 23,000 dues-paying members, EFF is a leading voice in the global and national effort to ensure that fundamental liberties are respected in the digital environment. EFF has campaigned both in the United States and abroad against ill-considered efforts to block, filter, or degrade access to the public Internet. EFF is actively developing and promoting technological tools that help consumers and public interest groups test their broadband connections to see if Internet access providers are interfering with the traffic to and from users' computers. EFF was among the first to independently test and discover the precise nature and scope of Comcast's 2007 interference with BitTorrent and other peer-to-peer applications.

The ACLU is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality

embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended the First Amendment for nearly a century in state and federal courts across the country. It has also been at the forefront of efforts to ensure that the Internet remains a free and open forum for the exchange of information and ideas. For years, the ACLU has advocated for net neutrality through legislative advocacy, litigation, and public education efforts.¹ The ACLU has served as direct counsel and *amicus* in several cases involving speech regulations on new communications mediums, including the Internet. *See, e.g., Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (striking down overbroad provisions of the Child Pornography Prevention Act because for abridging the freedom to engage in lawful speech); *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating vague and overbroad provisions of the CDA for violating the First Amendment); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (ruling that FCC may impose on cable TV industry content-neutral regulations that pass intermediate scrutiny).

Accordingly, the proper resolution of this case is a matter of substantial interest to EFF, the ACLU, and their respective members. *Amici* intend to file a brief of 7,000 words or less to address the FCC's Open Internet Order and its

¹ ACLU, *Petition: Tell the FCC: Preserve Net Neutrality!* (2015), https://action.aclu.org/secure/FCC_preserve_net_neutrality.

relevance to technological innovation and core First Amendment values—issues that are critical to both EFF and the ACLU’s missions.

In their brief, *amici* discuss the importance of de facto neutrality principles to the growth of the Internet, relying in part on supporting testimony from engineers who helped create the Internet, and explain that Order will support continued growth of the Internet as a platform for expression and innovation.

In addition, contrary to the position of Petitioners that the Order violates the First Amendment, *amici* contend that the Order in fact advances the values at its core by safeguarding the right of individuals to freely speak and be heard online. *Amici* posit that as a content-neutral speech regulation of a communications medium, the Order should be subject to intermediate scrutiny. Because the Order is substantially tailored to an important government interest in ensuring that the Internet remains an open channel of information, *amici* believe the Order properly balances the First Amendment interests at stake in favor of individuals’ right to access and share information on the Internet.

Finally, *amici* suggest that the Court offer guidance to the Commission regarding the proposed “rule of general conduct,” so that it does not become a vehicle for expensive and unnecessary litigation.

Amici respectfully submit that this notice is timely filed under D.C. Circuit Rule 29(b). EFF and the ACLU intend to file their brief no later than September 21, 2015 in accordance with D.C. Circuit Rule 29(c).

In addition, pursuant to Fed. R. App. P. 29(b)(1) and D.C. Circuit Rule 29(d), *amici* have worked to consolidate their arguments into a single brief. *Amici* have also coordinated with other *amici* to ensure that there is no overlap in the issues raised, to the greatest extent possible.

Dated: September 4, 2015

Respectfully submitted,

/s/ Corynne McSherry

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Local Rule 26.1, EFF and the ACLU submit the following corporate disclosure statement:

EFF and the ACLU are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in EFF or the ACLU.

Dated: September 4, 2015

Respectfully submitted,

/s/ Corynne McSherry
Corynne McSherry

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 4, 2015

Respectfully submitted,

/s/ Corynne McSherry

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Counsel for Amici Curiae